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Supreme Court, U.S.
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No. 04-681

In The

Supreme Court of the United States

CORA F. LINDQUIST, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF JAMES O. LINDQUIST,

Petitioner,

v.

BUCKINGHAM TOWNSHIP, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of the Respondents. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 215,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. Many of NAHB's members own and develop land. It is therefore concerned with any judicial decision that affects the regulation of land development. Protecting our members' fundamental constitutional rights in property has long been an integral part of our activities.

NAHB has appeared before the Court as an *amicus curiae* or as "of counsel" to the landowners in a number of cases involving the rights and remedies of landowners who have been adversely affected by governmental actions. These include: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. Cal.*

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[1] Pursuant to Rule 37.6 of this Court, *amicus* states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

Coastal Comm'n, 483 U.S. 825 (1987)[2]; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'Ship v. United States Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004); and *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04-108).

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2. The Court's opinion cited NAHB's brief. 483 U.S. at 840.

INTRODUCTION

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1. This Court has developed an interpretation of the Due Process Clause that protects one's basic substantive rights, in addition to procedural rights. "Substantive due process" guarantees that a state cannot deny a person's life, liberty or property without appropriate governmental justification, regardless of the government's procedures. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986) (explaining that the due process clause "bar[s] certain government actions regardless of the fairness of the procedures used to implement them . . ."); *Gundling v. Chicago*, 177 U.S. 183, 188 (1900) (explaining that it is possible for a state to deprive property rights by unreasonable legislation); *Allgeyer v. State of Louisiana*, 165 U.S. 578 (1897) (recognizing that "liberty" means more than a person's right to be free from incarceration, but also to be free to "live and work where he will" and enter into proper contracts).

In the case below, the Petitioners claimed that Buckingham Township violated their right to substantive due process by abusing its zoning and planning authority and unlawfully conspiring to thwart their land development project. *Lindquist v. Buckingham Township*, 106 Fed. Appx. 768, 769 (3rd Cir. 2004). In analyzing the Petitioner's substantive due process claim, the Court of Appeals applied the "shocks the conscience test." *Id.* at 773. Applying such a heightened test to a land use setting contradicts the clear precedent of this Court and will erode the rights of all persons to use and enjoy their property without unwarranted interference.

ARGUMENT

I. The Court Below Has Focused Only On A Subset of This Court's Substantive Due Process Precedent.

A. Governmental Action That Restricts a Landowner's Right to Use Property Must be Rationally Related To a Legitimate Governmental Purpose.

This Court's early decisions dealing with restrictions of land use establish a substantive due process test that the Court has never renounced. In *Village of Euclid v. Amber Realty*, 272 U.S. 365 (1926), landowners facially challenged a zoning ordinance on the grounds that it violated the Due Process Clause of the Fourteenth Amendment. The ordinance in question established use, height and area districts in the Village. *Id.* at 380. In upholding the constitutionality of the ordinance, the Court explained that a land use regulation would be deemed unconstitutional where its provisions are "clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals or general welfare." *Id.* at 395. In addition, the Court provided that when provisions of the ordinance are applied to "particular premises . . . or to particular conditions . . . some of them, or even many of them may be found to be clearly arbitrary and unreasonable." *Id.*

Just two years later, the Court decided *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), in which a landowner brought a due process challenge to a zoning ordinance as applied to his 29,000 square foot parcel. In *Nectow*, the Court stated that "[t]he governmental power to interfere by

zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited . . . ." *Id.* at 188. Moreover, it found that by applying the ordinance in question to the landowner, the City violated the Fourteenth Amendment because the restriction did "not bear a substantial relation to the public health, safety, morals and general welfare." *Id.* at 187.

Since these early decisions, the Court has infrequently reviewed cases where a landowner has complained that a government body violated the Due Process Clause under its zoning and planning authority.[3] *See Moore v. City of East Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., explaining the history between the years 1928 and 1977). However, in the cases that the Court has reviewed, it has never suggested that the government's action must "shock the conscience" before a violation of the due process clause can lie. Rather, the Court has consistently applied a more traditional "arbitrary or capricious," "rational basis" means-end analysis. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) ("Where property interests are adversely affected by zoning, the courts have generally emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns . . ."); *Moore*, 431 U.S. at 500 (explaining that the ordinance at issue violated the due process clause because it had only a "tenuous relation" to the government's stated purpose); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-96 (1962) (providing that to protect the public under its police power the governmental

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[3] In contrast, the Court's decisions analyzing property restrictions under the Takings clause have been more frequent. *See, e.g.*, cases cited *supra* at 1-2.

action must be reasonably necessary to accomplish its purpose).

In *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003), the Courts' most recent land restriction decision analyzed under the Due Process Clause, a landowner who desired to build a low income housing complex claimed that the City violated its substantive due process rights by i) subjecting its site plan approval to referendum, and ii) refusing to issue building permits after the City Council had approved the site plan. The Court did not look to see whether the City's actions shocked its conscience. Instead, it explained that there was no precedent to support the argument that subjecting the plan approval to referendum was "per se arbitrary governmental conduct" that would violate the due process clause. *Id.* at 199. Furthermore, the Court reviewed the denial of the building permits to determine whether the City's conduct was "egregious or arbitrary." *Id.* It found that the law director and engineer's refusal to issue the permits "rational" in light of a charter provision that made it unlawful to issue the permits. *Id.*

Though the Court has used a variety of terms to describe the proper test for determining whether a governmental land use restriction violates the due process clause, the Court has never overruled its decisions in *Euclid* and *Nectow*. Furthermore, the Court has never suggested that the lower courts should review such restrictions to determine whether they "shock the conscience."[4] By

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[4] In *Lingle v. Chevron U.S.A., Inc.*, 363 F.3d 846 (9th Cir. 2004), *cert. granted,* 125 S. Ct. 314 (U.S. Oct. 12, 2004) (No. 04-163), one issue presented is whether a land use restriction can be held invalid under the Takings Clause. Both the United States and the State of Hawaii argue that "substantially advance a legitimate

applying such a heightened level of review to a land use restriction case, the Third Circuit has disregarded this Court's precedent.

The Court should review this matter to reassert that governmental action that restricts a property owner's right to use property must be rationally related to a legitimate governmental purpose.

B. *County of Sacramento v. Lewis* Does Not Mandate Use of The "Shocks The Conscience" Test.

In the case below, the Third Circuit applied the "shocks the conscience" test by following its earlier decision in *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3rd Cir. 2003). *Lindquist*, 106 Fed. Appx. at 773. The *United Artist* panel relied on this Court's decision *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) when it explained that "executive action violates substantive due process *only* when it shocks the conscience . . . ." *United Artists*, 316 F.3d at 399-400 (emphasis added).

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state interest" is the proper test for a substantive due process violation. Brief For Petitioners at 23-28, *Lingle v. Chevron U.S.A., Inc.*, 363 F.3d 846 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 314 (U.S. Oct. 12, 2004) (No. 04-163) (section discussing "The 'Substantially Advance' Test Is Actually The Test For A Substantive Due Process Violation"); Brief of Amicus Curiae The United States at 9, 22 n.10, 24-26, *Lingle v. Chevron U.S.A., Inc.*, 363 F.3d 846 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 314 (U.S. Oct. 12, 2004) (No. 04-163) ("the phrase 'substantially advance' has its roots in due process jurisprudence . . ."). Neither, the United States nor Hawaii suggests that the proper due process test in a land use matter is whether the government's actions shock the conscience.

The Third Circuit misinterpreted *County of Sacramento* and has improperly expanded that decision beyond the facts it addressed. In *County of Sacramento*, the Court clearly explained that the core concept of due process is "the protection against arbitrary action." *County of Sacramento*, 523 U.S. 845-46 (citing *Hurtado v. California*, 110 U.S. 516 (1884); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); and *Daniels v. Williams*, 474 U.S. 327 (1986)). It then addressed it decisions that rely on the "shocks the conscience" test and explained that "the Due Process Clause is violated by executive action only when it 'can properly be characterized *as arbitrary, **or*** conscience shocking, in a constitutional sense.'" *County of Sacramento*, 523 U.S. at 847 (quoting *Collins v. Harker Heights*, 503 U.S. 115 (1992)) (emphasis added). By providing that the Due Process Clause is violated "only" when executive action shocks the conscience the Third Circuit has ignored the first, and traditional, standard by which the government can violate the Due Process clause: namely when its actions can be characterized as "arbitrary" or "irrational."

Moreover, "[c]onstitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas v. Cobb*, 532 U.S. 162, 169 (2001). In *County of Sacramento*, the Court stated the issue of the case as "whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high speed automobile chase aimed at apprehending a suspected offender." *County of Sacramento*, 523 U.S. at 835. The Third Circuit, however, applied the test described in *County of Sacramento*, to the "more mundane world of land use decisions, where lifeless

property interests . . . are involved" and has thereby narrowed the substantive due process rights of property owners in that circuit. *United Artists*, 316 F.3d at 407 (Cowen, J., dissenting). If this Court believes that "shocks the conscience" is the correct test for a matter dealing with governmental abuse of the police power over land use decisions, it must say so explicitly. *See Shalala v. Illinois Council On Long Term Care, Inc.* 529 U.S. 1, 18 (2000) ("The Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").

Finally, in *County of Sacramento*, the Court used the shocks the conscience test because it was "dealing with abusive *executive* action . . . ." *County of Sacramento*, 523 U.S. at 846 (emphasis added). In the case below, however, the Board of Supervisors denied the landowners plans by resolution. *Lindquist v. Buckingham Township*, No. Civ.A. 00-1301, 2003 WL 22757894, at *3-6 (E.D. Pa. Apr. 15, 2003). These types of actions are properly considered adjudicatory actions, not executive. *Thornbury Township Bd. of Supervisors v. W.D.D., Inc.*, 546 A.2d 744, 747 (Pa. Commw. Ct. 1998); *North Point Breeze Coalition v. City of Pittsburgh*, 431 A.2d 398, 401 (Pa. Commw. Ct. 1981). Thus, the Third Circuit has again misapplied *County of Sacramento* to a fact pattern to which it does not fit.

The Court should grant certiorari to correct the Third Circuit's incorrect interpretation of *County of Sacramento*.

II. The "Shocks The Conscience" Standard Confers State Governments Unwarranted Power to Restrict Property Rights.

In pre-Constitutional America, most states followed the English common law as the basis for their jurisprudence

and "the views of William Blackstone influenced American law long after the break with England." Ely, *supra*, at 32; *See Alden v. Maine*, 527 U.S. 706, 715 (1999) (explaining that Blackstone's "works constituted the preeminent authority on English law for the founding generation"). Blackstone wrote that individuals have certain "absolute" rights, which are rights that belong to individuals "merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it." J.W. Ehrlich, *Ehrlich's Blackstone* 42 (Greenwood Press 1959). "The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." *Id.* at 51.

The Colonial leaders of the United States believed that "the protection of private property was crucial to the preservation of freedom," and that "property rights antedated political liberty." James W. Ely, Jr., *The Guardian of Every Other Right, A Constitutional History of Property Rights* 28 (Oxford University Press 2d ed. 1998); *See generally* Bernard H. Siegan, *Property Rights* 50-52 (Transaction Publishers 2001). Thomas Jefferson, in fact, believed that property ownership was so fundamental to the creation of the United States that "he proposed in 1776 that the new state of Virginia grant fifty acres of land to every man that did not have that many." Gordon S. Wood, *The Radicalism of The American Revolution* 179 (1991). Because of the importance of property, the founding fathers understood that the function of government was to secure these rights. Ely, *supra*, at 32; *The Federalist No. 54*, at 278 (James Madison) (Bantam Classic ed., 1982) ("Government is instituted no less for protection of the property, than of the persons of individuals . . . . The rights

of property are committed into the same hands with the personal rights.").

Certainly, applying the amorphous "shocks the conscience" standard to matters dealing with governmental land use restrictions allows even "intentional and flagrant abuses of authority . . . to go unchecked." *United Artists*, 316 F.3d at 406-407 (Cowen, J., dissenting). In addition, such a demanding standard, will eventually lead to a further erosion of property rights. As governments take actions that restrict property rights more often, these actions are less likely to shock the conscience. In other words, actions that shock the conscience today will not shock the conscience 50 or 100 years from now. For example, a century ago it may have "shocked the conscience" to restrict land use by regulating the habitat of a fly or by deeming an upland drainage ditch a "navigable water." These types of regulations, however, are apparently not "conscience shocking" in today's heightened regulatory climate. *See, e.g., National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003). It is hard to accept that the founding fathers anticipated or would have condoned the erosion of property rights that will surely follow from applying the "shocks the conscience" standard to matters dealing with governmental restrictions of land use.

Finally, in supporting its use of the shocks the conscience test, the Third Circuit explained that even when government knowingly or in bad faith enforces unlawful land use restrictions its conscience is not shocked and the Constitution is not violated. *See* 106 Fed. Appx. at 774. (citing *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992); *Baker v. Coxe*, 230 F.3d 470 (1st

Cir. 2000); *Natale v. Town of Ridgefield*, 170 F.3d 258 (2d Cir. 1999); and *PFZ Properties, Inc. v. Rodriquez*, 928 F.2d 28 (1st Cir. 1991)).

The foundation of our government is that governmental officials may not restrict any right for personal or arbitrary reasons. Over 100 year ago, the Court explained that the nature and the theory of the United States'

> institutions of government [and] the principles upon which they are supposed to rest . . . do not . . . leave room for the play and action of purely personal and arbitrary power . . . . [S]overeign powers are delegated to the agencies of government, sovereignty itself [however,] remains with the people . . . . And the law is the definition and limitation of power.

Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). Furthermore, the purpose of the Fourteenth Amendment's due process clause is "to protect the people from the State." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989).

Actions taken by a government official that he or she knows are illegal, or that are taken for personal reasons, destabilize the foundation of our institutions of government. And these are exactly the types of actions from which the people must be protected. *Cf. Daniels v. Williams* 474 U.S. 327, 333-34 (1986) (explaining that a deliberate decision not to comply with required procedures violates the Due Process Clause); *Sullivan v. Town of Salem*, 805 F.2d 81, 85 (2d Cir.1986) (if a government official refused to issue permits to a developer for reasons

that were in violation of state law, such refusals "would constitute a deprivation of property without due process").

The Court should review this matter to ensure that the peoples' rights to own and use property are not continuously eroded and to protect the people from any government that would knowingly take illegal actions.

CONCLUSION

The U.S. Constitution does not allow government to deprive a citizen of his property without due process of law. By applying the shocks the conscience standard to a land use restriction case, the Court of Appeals has ignored this Court's precedent and unconstitutionally narrowed each citizen's right to own and use property. NAHB respectfully requests that the Court grant certiorari.

DATED: December 22, 2004

Respectfully submitted,

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